United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1274

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1274

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH METZGER,

Appellant.

On Appeal from the United States District Court
Southern District of New York

APPELLANT'S REPLY BRIEF

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ARGUMENT

As has been previously indicated, Appellant was convicted after trial on four out of sixteen counts on which he stood trial. Ten additional counts were severed in order to shorten the trial. The four counts as to which Appellant was convicted related only to two loan transactions, although the second of the two transactions was divided into three loans made simultaneously to three affiliated corporations.

Despite the fact that only two transactions were involved and despite the fact that the Appellant was acquitted with respect to all of the other transactions, including charges that he had accepted bribes from the persons to whom the bank had made or was making loans, the Government, in its answering brief, has devoted more than three-quarters of the discussion to counts in the indictment which were not tried, counts in the indictment as to which Appellant was acquitted, or transactions which were not even the basis of any of the chartes.

While it is conceded that this Court may consider facts relating to charges as to which Appellant was acquitted, the fact that the Government relies so heavily on testimony with respect to unrelated transactions is some indication of the weakness of the Government's case with respect to the two transactions which are before this Court.

More importantly, however, this reply brief is necessitated by the fact that there are a considerable number of inaccuracies in the Government's brief as well as a considerable number of omissions of facts necessary

to provide this Court with a clear picture of what transpired at the trial. Some of the more critical erros or omissions are discussed hereafter.

The Government stated at several points in its brief, including at pages "5" and "8", that the National Bank of North America ("NBNA") decided in August, 1971 at a meeting of the Ship Loan Committee, to discontinue lending any money to Tidal Marine Co., Inc. ("Tidal"), because Tidal had a bad working capital position, needed additional financing and/or was in bad financial condition. The Government's reference for this claim was pages "71" and "697" of the transcript. In fact, there was no such evidence and the referenced pages say nothing of the sort. At page "71", Jones, a bank officer testified that "the company was growing by leaps and bounds." He was concerned that they were going too fast and suggested "that we should slow down as far as Tidal Marine was concerned." (A. 24)*. At page "697", Bachman testified that "Really the question was how many eggs would you want in this one basket." (A. 37). Not one word about Tidal's financial condition.

Having misstated the nature of the determination of the Ship Loan Committee, the Government then proceeds to disregard time sequence by arguing that this decision in August, 1971 was the precipitating cause for Mark Scufalos ("Scufalos") to approach Appellant two months earlier, in June, 1971 as a front for Tidal.

In this connection, it is most noteworthy that although Scufalos

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* References are to Appendix pages.

testified at the trial at greath length he never indicated in any way that Appellant was aware of his true relationship with Tidal. Indeed his testimony creates quite the contrary inference, since he testified that he was requested by Harry Amanatides ("Amanatides"), President of Tidal, to approach Appellant and that Amanatides told him what to tell Appellant so as to deceive him. (R.212 - 216).

Further support for the conclusion that Appellant was never aware of the relationship between Scufalos and Tidal appears from testimony by John Shevlin ("Shevlin") that in a conversation in April or May, 1972, Amanatides told him and Metzger that if anything happened to Tidal, there would also be problems with Scufalos. (R.932). If Appellant already knew that Scufalos and Tidal were one and the same, why would the President of Tidal make such a statement to Appellant.

Finally, the Court is referred to the testimony of Scufalos that in July, 1972, after more than one year of his activity as a front for Tidal, he was called to Greece by Amanatides and told to come to New York to request an urgently needed short-term loan from Appellant.(R.233-234).It is inconceivable that if Appellant had been aware of the relationship between Tidal and Scufalos, it would have been necessary for Scufalos to fly in from Greece to make the loan request.

With respect to the first loan that was requested by Scufalos on the six dry cargo vessels, the Government states at page "11" of its brief, that although the Ship Loan Committee made it a condition of granting the loan that

evidence be obtained that the charterer, Transoceanic, had subchartered its vessels to respectable charterers, Appellant testified before the Grand Jury that he could not recall the names of any of the sub-charterers, the implication being that Appellant never followed through. In fact, Appellant testified before the Grand Jury and at the trial that he checked and was advised of the identity of the sub-charterers. (R.422). At the trial he recalled that they were six major Japanese shippers with whom Appellant, as well as everyone in the shipping market, was familiar. (R.1319-1320). Indeed these companies are mentioned in the Loan Offering Sheet. (Ex. 25). Bachman testified that all that was required was that the Ship Loan Department satisfy themselves that the ships were operating under some kind of period charter. (R.701-702).

The Government sates, at page "11" further, that evidence of Metzger's knowledge of the relationship between Scufalos and Tidal can be derived from the fact that Scufalos was represented at the closing of the six dry cargo vessels by James Hanlon, who was a lawyer for Tidal. However, there was no evidence at the trial to indicate that Appellant was aware of the relationship between Hanlon and Tidal. Even Melvin Tublin, the attorney for the bank testified that he did not know that Hanlon was connected with Tidal. (R.1194). Moreover, Tublin testified that he was provided with Hanlon's name as counsel for Scufalos in a conversation with Scufalos. (R.1194).

In further misleading fashion, the Government contends at page "12" that further evidence of Appellant's knowledge of the relationship between Tidal and Scufalos may be derived from the fact that the proceeds of the loan

on the six dry cargo vessels was deposited to the account of Eldorado Investments, Inc., whose address was in care of Amanatides. The Government, however, does not advise the Court that this was done pursuant to written instructions from Scufalos, (Ex. F) and that most of the funds were shortly thereafter transferred to the account of Union Commercial or for the benefit of Union COmmercial pursuant to written instructions from Scufalos. (Exs. G, H, J).

The Government, at page "12" of its brief and elsewhere, contends that Appellant concealed from the Loan Committee the fact that the original appraisal for the six dry cargo ships which was submitted to him, was addressed to Galaxy Steamship Corp., a subsidiary of Tidal, and that he obtained a substitute appraisal addressed to Union Commercial, the borrower, with which the Government also finds fault because that appraisal was dated three months prior to the date of its delivery. The Government fails to mention that the testimony indicated clearly that all of these documents were in the file and were available for examination by the Loan Committee and, indeed, may even have been examined by the Loan Committee. In any event, it seems clear that if Appellant were concerned that having an appraisal in the file addressed to Galaxy, a subsidiary of Tidal would be a give-away, he would hardly have been stupid enough to retain the appraisal in his file.

Moreover, the Government consistently argues that various items were concealed by Appellant from the Loan Committee solely on the basis of the fact that the fact sheet contains no reference to them. However, as the Government well knows, the Loan Committee in most cases had actual meetings

for the purpose of considering the various loans and there is absolutely no testimony with respect to what transpired at those meetings or what facts were revealed to the Loan Committee at that time.

The Government argues at page "12", that Appellant was remiss in failing to use an independent appraiser which, allegedly, was the customary procedure according to the testimony of Bachman. In fact, however, Bachman testified only that he believed appraisals were obtained directly by the bank but he wasn't certain because he wasn't in on ordinary appraisals. (R. 695). Jones, however, testified that it was merely bank policy to have a third party appraisal (R. 65) which was done here. Moreover, the appraisal was in the file and available to the Loan Committee.

At page "32", referring to the non-payment of the first installment on this loan, the Government states that Appellant was told by Scufalos' partner that he was uncertain why sufficient freights had not been deposited in the cash collateral account to cover that payment. In fact, this is a misstatement. Appellant testified that he spoke to Revinthis, Scufalos' manager in Piraeus, Greece who advised him that the funds from the charter hire had been erroneously deposited in London in the company's account there and had been inadvertently confused with other funds of the company and that the situation would be rectified in the future. As a matter of fact, arrangements were made to open a new account in a different name in an attempt to avoid a similar problem in the future. (R.1360-1363).

At page "32", the Government sarcastically asserts that Appellant

"somehow suggested" that a default on the loan on the six dry cargo vessels might cause difficulties for the bank. The implication of their statement is that his suggestion was specious. However, when Appellant tried during the trial to explain his reasons for wanting to prevent a default and what it was that he thought would transpire if a default were called by the bank, the Government strenuously objected and the Court sustained its objection. (R.1264-1268). It ill behooves the Government now to deride the absence of a detailed explanation.

At page "38", the Government states that at about the time of the loan on the six dry cargo vessels, Amanatides reduced his dealings with Shevlin and commenced to deal with Appellant. Only Shevlin makes this statement, and his testimony is belied by the facts. There was introduced into evidence literally dozens of documents covering the entire one year span during which this conspiracy was alelged to have existed, indicating that correspondence with respect to the Tidal accounts was always directed to Shevlin or to Joel Heine but almost never to Appellant.

With respect to the next loan on the vessels May and June, the Government contended that Appellant made the loan without having had any communication with Scufalos and then, almost as an afterthough, refers briefly in a footnote to the fact that there was a letter in the bank file on the stationery of Union Commercial requesting that loan and purportedly signed by a director. Although Scufalos could not identify the signature, there is no reason to conclude that Appellant was not warranted in relying on it.

At page "30", the Government in discussing the loans on the tankers Tropis and Tekton, which was made in December, 1971, refers to Appellant's testimony that he refused to close the loan without certain documentation and insisted on holding half of the loan proceeds in escrow. The Government omits to include in its statement of the facts the testimony of Patrick Martin, the attorney who handled the closing for the bank and whose testimony was corroborated by the notes which he made contemporaneously, to the effect that Appelant had, in fact, refused to close the loan until ordered to do so and that Appellant had insisted on holding half the loan proceeds in escrow until certain discrepancies were cleared up.(R.618-629). It should be remembered that this was the loan with respect to which Appellant allegedly received a bribe of $45,000, some of it on the very afternoon when this loan closed. This alleged bribe was for the uprose of inducing him to expedite this loan.

In this connection, some reference should be made at this point to the emphasis placed by the Government on the testimony of Shevlin to the effect that Appellant participated in a bribe. In the first place, the Government's summary of the evidence nowhere indicates to he Court that the sole source of the story that Appellant participated with Shevlin in a bribe came from the testimony of Shevlin.

A reading of that testimony reveals it as so inherently incredible as to make it perfectly clear why the jury acquitted Appellant of those charges. In any event, even if the Court were to attribute some value to that testimony for purposes of evaluating the evidence on the four counts as to which Appellant

was convicted, that evidence casts no light on the subject when it is considered in connection with the further testimony of Shevlin that he was never asked to do anything wrong, that he never asked Appellant to do anything wrong, and that he would not have participated in the granting of any loan which was not a good bank loan. (R. 964-971).

Thus, for the purpose of determining whether or not Appellant misapplied bank funds in connection with the making of the loan on the vessel Tagma or with respect to the three short-term loans in July, 1972, Shevlin's testimony about a bribe in no way supports the jury finding on the question of misapplication of bank funds, even if it could be said that the jury believed Shevlin after its acquittal of Appellant on the bribery charges.

Shevlin's testimony is further destroyed by the matter of simple arithmetic. Shevlin testified that the only bribe he ever received was in connection with this transaction. (R. 993-1001) According to his testimony, he received the sum of $43,000, over a period of approximately five months. He testified that this sum was used by him to support himself for a period of almost two years at a cost of $6,000 per year, during the course of which he bought a $12,000 boat, a $7,000 car, a $1,500 engagement ring, made five or six trips to Europe (once on his honeymoon), a trip to Barbados, paid $15,000 in legal fees. The total cost of all of these items is substantially more than $43,000. The significance of this fact is that it is the contention of the Appellant that Shevlin testified to having shared a bribe with the Appellant, despite the incredible nature of his story, for the purpose of concealing the fact that he was the person who received all of the money and used Appellant to double

his take from the bribers.

With respect to the question of the safe owned by Appellant, the Government stated at page "33" that Appellant testified that there was a plethora of robberies in his area. The word "plethora" is the Governments. Metzger merely testified that there had been many robberies in the area and that he was concerned. (R.1417) . The Government neglected, however, to mention the fact that Metzger's wife confirmed his testimony about the robberies and the safe and further testified that only she went to the safe and that it never contained any substantial sums of money. The Government also chose to ignore the testimony of Appellant's neighbor to the effect that she had in the past held Mrs. Metzger's jewels for safekeeping when they were away from home, and that the safe had been discussed by her with the Metzgers on may occasions long prior to its actual installation. Furthermore, she testified that the safe was delivered in broad daylight and placed on the front lawn in plain view of all of the neighbors around, hardly a basis for concluding that Appellant was engaged in some surreptitious activity and certainly not a basis for concluding that he was seeking to install a secret hiding place for his ill-gotten gains.

With respect to the general subject of short-term loans, the Government again overlooked numerous facts tending to limit the effectiveness or validity of its proof. The Government, throughout its brief, referred to the written guidelines identified by Bachman as representing the ultimate authority. The conclusion reached by the Government accordingly was that any failure to follow these written guidelines was, ipso facto, a violation of the officer's

obligation. In taking this position, the Government chose to ignore the fact that Shevlin, its own witness, stated that he never followed the guidelines and that they were never followed by anybody in the department for all of the time that he was there. (R. 955, 956). The Government further chose to ignore the fact that numerous loan fact sheets indicated right on their faces that the so-called written guidelines were not being followed, and that loans were being made without Loan Committee approval although there were outstanding loans to the borrower in the millions. (Exs.1A,1C,6A,AE,BA,BB,CQ,CS,CV,CW,CY,DC,DD,DE,DF). The Government chose to ignore the testimony of Bachman and Jones based upon their investigation and recollection that for years there was no evidence of any short-term loan ever having been approved by the Loan Committee. The Government chose to ignore the fact tht the evidence established that each month a list of short-term loans was circulated to various persons in the bank so that it was apparent to anyone who took the trouble to look that short-term loans were being granted without Loan Committee approval. (R.1151-1153,Ex.D). The government chose to ignore the fact that there were at least three examinations by three different groups of the affairs of the bank during the course of each year, and that these examinations included previews of selected loans which would invariably have revealed the non-existence of Loan Committee approval for particular short-term loans.(R.732,744,745).

Under such circumstances, it is inconceivable that the Government could be contending that a criminal violation of the law was involved merely

because Appellant made a short-term loan without Loan Committee approval.

Moreover, Bachman testified that he did not know who received copies of the rules, and certainly did not know whether Appellant had ever seen them. (R. 724,.725).

Having dealt with the bulk of the Government's brief which related to transactions other than the ones as to which Appellant was convicted, attention will now be directed to Count 77, one of the counts as to which there was a conviction. This Count related to a loan of $3,200,000 ostensibly for the purchase of a ship called the Tagma. The Government's brief, commencing on page "45", alleges numerous items purportedly indicating Appellant's criminal activitiy in connection with this loan. Most of the alleged facts, however, are not supported by any evidence at the trial.

Thus, the Government states, at page "45", that Appellant recommended the loan at a time when he had full knowledge that Scufalos was in financial difficulty. There was absolutely no such testimony at the trial.

It is further stated that Appellant knew that Scufalos had not been meeting his loan repayment obligations. Again, there is no support for this statement. All of the loans were repaid, according to the bank records, albeit to some extent from other loans. However, there is no evidence that Appellant ever knew that the repayments were being made by means of other loans. The records introduced bythe Appellant during the course of the trial reveal that all of the authorizations for the transfer of the funds received on these other loans were made either by Shevlin or by Joel Heine, an administrative assistant

There was not a single indication of a transfer authorized by Appellant in connection with a repayment of any loan.

The Government tgeb states that Appellant concealed the fact that Tidal had made fraudulent representations in connection with a charter in the Spring of 1971 and again in February of 1972. In the first place, since Tidal was not the borrower, it seems immaterial that Metzger did not advise the Loan Committee of any knowledge which he had about its charters. Moreover, Appellant testified that he told Patrick Martin, the bank's attorney who closed the loan to Tidal that he had heard there was a problem although he didn't know what it was. (R.1426).. Martin corroborated Appellant and testified that he followed up the matter by conferring with Shevlin and Spartalis who assured him the matter was being taken care of.(R. 606-612).

At page "47", the Government states that Appellant failed to advise the Committee that monthly payments of charter hire had not been received in connection with other loans to Scufalos. In fact, there was no evidence that Appellant was ever aware of the extent to which charter hire was received or applied to repayment of these loans or that the source of some payments was something other than charter hire. The evidence indicates only that the loans were paid, that to some extent payment was made with the proceeds of short-term loans and that no notice of deficiency was ever called to the attention of Appellant.

The Government places great emphasis upon the situation which arose with respect to the charger on the Tagma. The loan offering sheet submitted to the Loan COmmittee, indicated that after the completion of a one year charter, the ship was to be chartered to Montecatani Edison, an Italian company,

for three years. Appellant who, the Government would have us believe, was engaged in a fraudulent scheme to conceal the invalid charter from the Loan Committee, communicated with outside counsel for the bank and instructed them to check the charters carefully before closing the loan. (R1204-1206). It is inconceivable that this could be interpreted as the act of a conspirator. The Government then erroneously asserts at various points in the brief, that the bank's counsel was advised that there was no record of any such charter. In fact, the cable received by the bank's counsel from an attorney in Italy indicated merely that the freight division of Montecatani Edison had no record of the charter and presumed that it was being handled in a different department. (Ex. MN). As a matter of fact, there is not to this day any evidence indicating that there was not a Montecatani charter ready to be signed subject to an attempt to increase the charter hire rate.

The Government furthermore omits to discuss or call the Court's attention to the fact that after the Montecatani Edison charter developed problems, the borrowers sought to get approval for at least two other charterers before P. Wigham Richardson was finally approved. However, in both cases, Appellant, the co-conspirator, the willful misapplier of bank funds, refused to accept the charterers, on the ground that they were not sufficient responsible financially. (R.579, 1436, 1437).

It was only some two months after the loan was approved that Appellant agreed to accept P. Wigham Richardson as a charterer and then only after checking with Captain Berger, a substantial shipper and with counsel for

the bank to ascertain whether or not P. Wigham Richardson was, in fact, engaged in any substantial manner in the shipping or chartering business. It was only after discovering that P. Wigham Richardson was in fact a larger charterer and operator of vessels that Appellant agreed to accpet it as a charterer. (R.1439-1441).

The Government refers to the P. Wigham Richardson's charter as a fraudulent or purported charter and in another place as an option rather than a charter. Charitably it may be stated that the Government is mistaken in its analysis. The charter was, in fact, a valid charter. It was executed by P. Wigham Richardson and it was binding unelss and until an option to terminate was exercised. It is true that had Appellant or bank's counsel been aware of the option, the closing would not have taken place. However, they were not aware of the existence of this option because in a manner unknown to anyone to this date, the pages containing the option which was included as a rider to the charter, were removed before the signed charter agreement was delivered to the bank's counsel in London. Appellant was not even present in London at or prior to the closing of this loan and could hardly be said to have participated in the removal of that page. Very significantly, Shevlin was in London at the time.

But, the Gover-ment says, Appellant is guilty of a crime because he failed to obtain approval for the substitution of a charterer. The Government relies on the testimony of Bachman that it would have been proper for Appellant first to obtain approval either of the Loan Committee or of a superior officer. Aside from the fact that Appellant testified that he did speak to

Bachman and obtained Bachman's approval, it should be recalled that Bachman further testified that such approval in his opinion was only required if the substitution or change was material. This he said was a question of judgment. Moreover, he said that the substitution of a charterer was not necessarily the kind of change which would require approval if the new charterer was of a comparable strength with the substitute charterer. (R.707,708). It cannot be said that Appellant, if he exercised his judgment not to obtain any approval because he felt it was unnecessary to do so under the circumstances was thereby guilty of a violation of a criminal statute.

With respect to the three loans on July 26, 1972, in the total amount of $365,000, it is apparently the Government's position that Appellant's crime consisted in making these loans when they were in excess of his lending authority, a contention which has already been adequately disposed of.

In addition, the Government contends that although Appellant testified that the purpose of the loan was to cover checks issued by Tidal to pay for insurance on Scufalos' vessels, in fact, the purpose of the loan was to enable Scufalos to pay off his partners who were threatening to blow the whole thing up unless they were paid. The sole source of this information is John Shevlin. Aside from the doubtful credibility of Shevlin which, of course, is not for this Court to decide, the testimony is inherently incredible. If the Government's theory of the case is accepted, Tidal and Scufalos were engaged in a scheme to use the money of the National Bank of North America and other banks to finance a substantial increase in the assets of Tidal in order to support a $30,000 public offering. For purposes of doing this, Tidal was paying to

Scufalos substantial premiums for the Scufalos vessels. These premiums, of course, rebounded to the benefit of Scufalos' partners. If Scufalos' partners knew of this fraud, then they were participants. It is inconceivable that these participants who would have been guilty themselves of a crime and who had benefitted handsomely already from this crime, would have threatened to blow up the entire scheme unless they received every penny they believed was coming to them.

The Government's further statement that in fact, the proceeds were used for this purpose is not supported by any evidence in the record at all. There is no testimony or evidence indicating the ultimate disposition of the proceeds of those loans. However, there is evidence indicating that those loans were repaid in ten days rather than the thirty days allotted.

Moreover, there was more than ample security for those loans in the form of the assignment of charter hire on five separate vessels, three of them belonging to Scufalos and two to Tidal. The Government erroneously contends that the charter hire on those vessels was already assigned, and that therefore, there was not adequate security. The Government, apparently inadvertenly, overlooks the fact that the assignment of charter hire which was given previously as security for the long term ship mortgages, provided only for the withdrawal of one-third of each month's payment for application to the long-term loan. This left two-thirds of the charter hire available for repayment of the short-term loans.

Appellant's testimony that he felt it was imperative to make the loan because it was to be used for the payment of insurance premiums which were

critical since these vessels were out on the high seas, provides a clear and convincing explanation of the reason for making the loan. In this connection, reference again should be made to the fact that if it were true that Appellant knew the relationship between Scufalos and Tidal, why would it have been necessary for Amanatides to require Scufalos to fly in from Greece for the sole purpose of making a loan request to Appellant. The reason is that Appellant was as much the victim of the fraud as was his employer, The National Bank of North America.

In summary, it seems clear that the evidence is not susceptible of a reasonable inference that Appellant was guilty of willful misapplication of bank funds. As has been earlier set forth in the main brief, virtually all of the evidence on which the Government relies to establish that Appellant committed a willful violation of law, is circumstantial. The Government argues in its brief that Appellant misconceives the state of the law with respect to circumstantial evidence, and cites in support of that proposition several cases which hold that circumstantial evidence need not exclude every other possible hypothesis which is inconsistent with guilt. Appellant does not quarrel with that interpretation of the current law. Appellant does, however, argue that it cannot logically be said that circumstantial evidence is sufficient to support a conviction if the inferences to be drawn from that evidence are not sufficiently strong to eliminate reasonable doubt. In this respect, the quotation which appears on page "34" of the Government's brief from the case of United States v. Taylor, 464 Fed.2d 240, 243 (2d Cir., 1972), is in point. The Court,

in that case said that the jury had the right to "draw justifiable inferences of fact" from circumstantial evidence. This is precisely Appellant's argument. Appellant contends that an inference of guilt is unjustifiable under all of the circumstances. Appellant does not contend that this Court must find that all possible inconsistent inferences must be negated but rather that the Court must find that the inferences of guilt are sufficiently strong so that there is no room for a reasonable doubt as to the guild of Appellant.

Using this test, it is submitted that the jury had an insufficient basis on which to find Appellant guilty, and his conviction should be reversed.

Respectfully submitted,

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